Supreme Court, U.S.
FILED
001257 NOV 28 2000

No. _____

In The

# Supreme Court of the United States

TIMOTHY LESTER HERMAN,

*Petitioner,*

vs.

STATE OF OKLAHOMA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals For The State Of Oklahoma**

## PETITION FOR A WRIT OF CERTIORARI

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38 pp

## QUESTION PRESENTED FOR REVIEW

Did the Oklahoma Court of Criminal Appeals err in ruling that Petitioner failed to establish entitlement to post-conviction relief on the ground that all issues which could have been raised by Petitioner in his first application for post-conviction relief were barred by the Doctrine of Waiver when the very basis of his fourth application was that the Petitioner was not advised of his right to have an attorney appointed to represent him on appeal at the time he pled guilty?

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## OPINIONS BELOW

This Petition for Certiorari arises from the order and judgment of the Oklahoma Court of Criminal Appeals dated August 8, 2000 (App. 1-3) affirming the order of the District Court of Tulsa County, State of Oklahoma (App. 24-28) denying Petitioner's fourth application for post-conviction relief dated June 29, 2000 (App. 4-23).

## JURISDICTION

This Court has jurisdiction to review the final orders and judgments of the Court of Appeals by Writ of Certiorari pursuant to 28 U.S.C. § 1257. Furthermore, this Court has jurisdiction to vacate the orders and judgments below and order reconsideration of Petitioner's case pursuant to the Court's supervising powers under 28 U.S.C. § 2106.

## OKLAHOMA STATUTES INVOLVED

22 O.S. § 1086

21 O.S. § 701.7

## STATEMENT OF THE CASE

### A. Introduction

Timothy Lester Herman ("Herman") pled guilty to first degree murder, 21 O.S. § 701.7 on April 23, 1979 in the District Court of Tulsa County, State of Oklahoma,

Case number CRF-78-2776. The Honorable Jay Dalton sentenced Herman to life imprisonment.

The Petitioner was represented by Mr. Ronald Mook, of Tulsa and did not directly appeal the conviction and/or sentence to the Oklahoma Court of Criminal Appeals.

Herman previously sought post-conviction relief from the District Court three times which were denied on September 5, 1984, November 9, 1988, and on December 18, 1991, and the Oklahoma Court of Criminal Appeals, Case No. PC-84-613, denied November 1, 1984.

Herman filed his Fourth Application for Post-conviction relief on May 18, 2000 which was denied by the Honorable Thomas Gillert on June 29, 2000. Herman appealed to the Oklahoma Court of Criminal Appeals which affirmed the district court on August 8, 2000. It is from this order that Herman files this Petition for a Writ of Certiorari.

**B. Statement of Facts.**

The transcript of Petitioner's entry of plea, and sentencing, conducted on April 23, 1979, reveals a failure by the District Court, in accepting Mr. Herman's purported plea of guilty, in rendering any advice to Petitioner, or even in making any reference whatsoever, either to Mr. Herman's right to be presumed innocent, have a lawyer represent him, right to have witnesses ordered to appear and testify, right to have guilt proven beyond a reasonable doubt, and right to a unanimous jury verdict.

The Court gave inadequate advice to Mr. Herman regarding his rights to appellate review. Although the

Court, did allude to an "appeal," the Court (1) was incorrect in calling the appellate remedy an "appeal," (2) failed to advise the Petitioner of the right to the appointment of appellate counsel and/or the preparation of the record at public expense, and (3) generally failed to comply with the mandate of *Copenhaver v. State*, 431 P.2d 529 (Okla.Cr., 1967).

## REASONS FOR GRANTING THE WRIT

Timothy Herman was never advised by his sentencing judge that he had a constitutional right to have an attorney represent him on appeal if he chose to appeal the finding of guilt and sentence. He subsequently attempted to appeal his conviction *pro se* three times. He was unsuccessful on each occasion.

Only when counsel was retained and reviewed his case, were issues of error discovered. Herman cannot be held responsible for failing to raise issues in his prior appeals when he did not choose to represent himself. He simply had no choice. Herman was only twenty years old at the time of the plea. He had never been charged with any other crime.

How can the Doctrine of Waiver (22 O.S. § 1086) cited by the Oklahoma Court of Criminal Appeals apply in this instance when Herman was never told of his right to the assistance of counsel by the sentencing judge? Had he been told of his right to counsel on appeal and proceeded *pro se*, the Doctrine of Waiver would clearly apply. Here, it should not.

The advice given by Herman's sentencing judge was so deficient as to render his conviction unconstitutional. His failure to raise those issues on his *pro se* appeals was not the choice of a trained attorney, but rather, the ignorance of a twenty-year old who was not properly advised by the Court.

Under *Boykin v. Alabama*, 395 U.S. 238, at 243, 23 L.Ed.2d 274, 89 S.Ct. 1709 (1969), *Smith v. Oklahoma City*, 513 P.2d 1327, at 1329 (Okla.Cr., 1973), *Williams v. Meacham*, 592 F.Supp. 281 (N.D.Okla., 1984), and *King v. State*, 553 P.2d 529, 533-536 (Okla.Cr., 1976), a court must, before accepting a tendered plea of guilty, specifically advise the defendant of, *inter alia*, the defendant's (a) right to be presumed innocent, (b) right to have a lawyer represent defendant, (c) right to have witnesses ordered to appear in court to testify and present evidence of any defense, (d) right to have state required to prove guilt beyond a reasonable doubt, and (e) right to a unanimous jury verdict.

Contrary to the mandates of these cases, however, the Transcript of Petitioner's entry of plea, and sentencing, conducted on April 23, 1979, reveals a failure by the District Court, in accepting Mr. Herman's purported plea of guilty, in rendering any advice to Petitioner, or even in making any reference whatsoever, either to Mr. Herman's right to be presumed innocent, have a lawyer represent him, right to have witnesses ordered to appear and testify, right to have guilt proven beyond a reasonable doubt, and right to a unanimous jury verdict. Absent such advice, the Petitioner's purported plea of guilty may not be deemed voluntary, and the Court's acceptance of

that purported plea was, under the cases cited, a constitutional and legal nullity.

In addition, the District Court further failed to advise Mr. Herman in another critical regard, namely, that for the offense of Murder, the State would have to prove the specific mental intent required therefor. Absent such express advice to a defendant, a plea of guilty to "malice aforethought" murder is void. See, e.g., *Henderson v. Morgan*, 426 U.S. 637, 49 L.Ed.2d 108, 96 S.Ct. 2253 (1976).

The District Court's failures to advise, as recited above, can be fully established by a simple review of the Transcript of April 23, 1979. The fact that a guilty plea was purportedly entered, and/or that no appeal was taken, does not constitute evidence of "waiver" of the fundamental rights to a fair trial, and to an appeal. Legally, there is no presumption of "waiver" in circumstances such as those at bar, and a silent or ambiguous record is to be construed in the Petitioner's favor. See *Ex Parte Barnett*, 67 Okla.Cr. 300, 94 P.2d 18 (Syl. 8-9) (1939), and *Carnley v. Cochran*, 369 U.S. 506, 516, 8 L.Ed.2d 70, 82 S.Ct. 884 (1962).

This presumption against waiver is especially applicable in cases dealing with very young defendants (and Petitioner was only twenty years of age at the time, with no record of prior involvement in criminal activity, or in contacts with law enforcement). Chronologically, Petitioner was several years over the age of minority, but the spirit of such cases as *Bishop v. State*, 595 P.2d 795, 796 (Okla.Cr., 1979), should still be respected in this case.

## CONCLUSION

The Doctrine of Waiver cannot apply to a Defendant who was not afforded the minimally required advice from the Court. Timothy Lester Herman is entitled to withdraw his plea of guilty and proceed to trial.

Respectfully submitted,

ALLEN J. AUTREY
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*Counsel for Petitioner*

**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

| | | |
|---|---|---|
| TIMOTHY LESTER HERMAN, Petitioner, | ) | No. PC-2000-1003 |
| v. | ) | |
| STATE OF OKLAHOMA, Respondent. | ) | |

**ORDER AFFIRMING DENIAL OF FOURTH APPLICATION FOR POST-CONVICTION RELIEF**

(Filed August 8, 2000)

Petitioner has appealed to this Court from an order of the District Court of Tulsa County denying his fourth application for post-conviction relief in Case No. CF-78-2776. In that case, Petitioner pled guilty to Murder in the First Degree and received a sentence of life imprisonment. Petitioner did not perfect an appeal of his conviction.

Subsequently, Petitioner filed an application for post-conviction relief in the District court which was denied. On appeal, this Court affirmed the District court's order. *Herman v. State*, PC-84-613 (Okl.Cr. November 1, 1984) (not for publication). Thereafter, Petitioner filed a second application for post-conviction relief in the District Court. The District court denied relief on November 9, 1988, but Petitioner did not appeal to this Court. Finally, Petitioner filed a third application for post-conviction relief, which was denied by the District Court on December 18, 1991. On appeal, this Court affirmed the District Court's order.

*Herman v. State*, PC-92-58 (Okl.Cr. June 11, 1992) (not for publication).

In his fourth application for post-conviction relief, Petitioner alleges 1) he "was not given the minimum advice" by the District court during the entry of his guilty plea, 2) the District Court failed to advise Petitioner of his appellate remedies, and 3) Petitioner never formally entered his plea of guilty. The District found the claims barred by the doctrine of waiver, because the claims could have been asserted in Petitioner's first application for post-conviction relief. Finally, the District Court found Petitioner's third claim was barred by the doctrine of res judicata because it had been denied in Petitioner's prior applications for post-conviction relief.

We find no error. It is well settled that all claims previously raised by Petitioner and ruled upon are barred by the doctrine of res judicata, and all issues which could have been raised by Petitioner, but were not, are waived. *Webb v. State*, 1992 OK CR 38, ¶ 5, 835 P.2d 115, 116. Moreover, such issues may not be the basis of a subsequent post-conviction application by Petitioner. 22 O.S.1991, § 1086. All of Petitioner's claims clearly fall within these two procedural bars.

Because Petitioner has failed to establish entitlement to post-conviction relief, the order of the District Court of Tulsa County denying Petitioner's fourth application for post-conviction relief is **AFFIRMED**. Further, Petitioner has exhausted his State remedies regarding the issues raised in his applications for post-conviction relief in Case No. CF-78-2776. Subsequent application on any of

these issues is barred. Rule 5.4, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (1999).

**IT IS SO ORDERED.**

**WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this 8th day of August, 2000.

/s/ Reta M. Strubhar
**RETA M. STRUBHAR,**
**Presiding Judge**

/s/ Gary L. Lumpkin
**GARY L. LUMPKIN,**
**Vice Presiding Judge**

/s/ Charles A. Johnson
**CHARLES A. JOHNSON, Judge**

/s/ Charles S. Chapel
**CHARLES S. CHAPEL, Judge**

/s/ Steve Lile
**STEVE LILE, Judge**

ATTEST:

/s/ James Patterson
Clerk

**IN THE DISTRICT COURT FOR TULSA COUNTY**

**STATE OF OKLAHOMA**

| | | |
|---|---|---|
| **TIMOTHY LESTER HERMAN,** *Petitioner,* | ) | **Case No. CRF-78-2776** |
| **vs.** | ) | |
| **STATE OF OKLAHOMA,** *Defendant.* | ) | |

**APPLICATION TO WITHDRAW PLEA OF GUILTY, APPLICATION FOR POST-CONVICTION RELIEF, and/or PETITION FOR A WRIT OF HABEAS CORPUS**

(Filed May 18, 2000)

COMES NOW the Petitioner, TIMOTHY LESTER HERMAN, who is presently imprisoned in the Mack Alford Correctional Center, P.O. Box 220, Stringtown, Oklahoma, 74569, as Prisoner No. 100418, and for his instant Cause(s) respectfully alleges and avers as follows:

**PART A: FACTS**

1. The conviction and sentence from which Petitioner seeks relief is as follows:

   a. Court in which sentence was rendered: District Court of Tulsa County.

   b. Case number: CRF-78-2776.

2. Date of sentence: April 23, 1979.

3. Terms of sentence: Life imprisonment (plus costs, etc.).

4. Name of presiding judge: Hon. Jay Dalton, District Judge.

5. Petitioner is now in custody directly from this sentence.

6. Petitioner was convicted herein of the felony offense: First Degree Murder, 21 O.S. 701.7.

7. The finding of guilt herein was made pursuant to Petitioner's purported plea of Guilty.

8. N/A

9. The Petitioner was represented by Mr. Ronald Mook, of Tulsa.

10. Mr. Mook was privately retained to represent Petitioner.

11. Petitioner did not thereafter directly appeal the instant conviction and/or sentence to the Oklahoma Court of Criminal Appeals.

12. N/A.

13. N/A.

14. Petitioner has previously sought post-conviction relief from the District Court three times which were denied on September 5, 1984, November 9, 1988, and on December 18, 1991, and the Court of Criminal Appeals, Case No. PC-84-613, denied November 1, 1984.

## PART B: GROUNDS FOR RELIEF

The Petitioner believes he has three broad grounds for relief, namely:

1. That the fact that on this presently-challenged offense, the Petitioner was not given the minimum advice by the Court required for rendering

his purported plea of guilty herein voluntarily; and

2. That the Court's failure to advise Petitioner of, and/or to allow Petitioner, his appropriate appellate remedies herefrom.

3. That the Petitioner never formally entered his plea of guilty.

**First Broad Ground for Relief:**
**The District Court's Failure to Advise of Critical Rights and Elements of the Offense Charged**

Under *Boykin v. Alabama* (9169) 395 U.S. 238, at 243, 23 L.Ed.2d 274, 89 S.Ct. 1709, *Smith v. Oklahoma City* (Okla.Cr., 1973) 513 P.2d 1327, at 1329, *Williams v. Meacham* (N.D.Okla., 1984) 592 F.Supp. 281, and *King v. State* (Okla.Cr., 1976) 553 P.2d 529, 533-536, a court must, before accepting a tendered plea of guilty, specifically advise the defendant of, *inter alia*, the defendant's (a) right to be presumed innocent, (b) right to have a lawyer represent defendant, (c) right to have witnesses ordered to appear in court to testify and present evidence of any defense, (d) right to have state required to prove guilt beyond a reasonable doubt, and (e) right to a unanimous jury verdict.

Contrary to the mandates of these cases, however, the Transcript of Petitioner's entry of plea, and sentencing, conducted on April 23, 1979, reveals a failure by the District Court, in accepting Mr. Herman's purported plea of guilty, in rendering any advice to Petitioner, or even in making any reference whatsoever, either to Mr. Herman's right to be presumed innocent, have a lawyer represent

him, right to have witnesses ordered to appear and testify, right to have guilt proven beyond a reasonable doubt, and right to a unanimous jury verdict. Absent such advice, the Petitioner's purported plea of guilty may not be deemed voluntary, and the Court's acceptance of that purported plea was, under the cases cited, a constitutional and legal nullity.

In addition, the District Court further failed to advise Mr. Herman in another critical regard, namely, that for the offence of Murder, the State would have to prove the specific mental intent required therefor. Absent such express advice to a defendant, a plea of guilty to "malice aforethought" murder is void. See, e.g., *Henderson v. Morgan* (1976) 426 U.S. 637, 49 L.Ed.2d 108, 96 S.Ct. 2253.

**Second Broad Ground for Relief:**
**The District Court's Failure to**
**Advise of/Allow Proper Appellate Remedies**

In addition, the Court gave inadequate advice to Mr. Herman regarding his rights to appellate review. Although the Court, at pp. 7, 8 and 10 of the sentencing transcript, did allude to an "appeal," the Court (1) was incorrect in calling the appellate remedy an "appeal," (2) failed to advise the Petitioner of the right to the appointment of appellate counsel and/or the preparation of the record at public expense, and (3) generally failed to comply with the mandate of Copenhaver v. State (Okla,Cr., 1967) 431 P.2d 529.

Mr. Herman may not be "charged" for any failure or inadequacy on his part to have properly "appealed" his conviction at bar.

**Third Broad Ground for Relief:**
**Petitioner Never Formally Entered a Plea of Guilty**

Under *Boykin v. Alabama* (9169) 395 U.S. 238, at 243, 23 L.Ed.2d 274, 89 S.Ct. 1709, *Smith v. Oklahoma City* (Okla.Cr., 1973) 513 P.2d 1327, at 1329, and *King v. State* (Okla.Cr., 1976) 553 P.2d 529, 533-536, and 22 O.S. §516, a court must inquire of the defendant how he pleads.

At no time was Mr. Herman asked, "For the record, how do you plead?" Mr. Herman never actually plead guilty. It is clear that he was there to enter a plea of guilty to the charge. The court asked Mr. Herman if he knowingly was entering this plea of guilty, see Transcript p.5, and the Court accepted his plea of guilty, see Transcript p. 6. However, the Court failed to ask Mr. Herman how he plead and if he was pleading guilty because he was guilty and for no other reason as required by *King v. State* (Okla.Cr., 1976) 553 P.2d 529, 533-536, and 22 O.S. §516.

**Proof and Procedures**

The District Court's failures to advise, as recited above, can be fully established by a simple review of the Transcript of April 23, 1979 (the original of which should be in the Court's file).

As has been alluded to above, the fact that a guilty plea was purportedly entered, and/or that no appeal was taken, does not constitute evidence of "waiver" of the fundamental rights to a fair trial, and to an appeal. Legally, there is no presumption of "waiver" in circumstances such as those at bar, and a silent or ambiguous record is to be construed in the Petitioner's favor. See *Ex Parte Barnett* (1939) 67 Okla.Cr. 300, 94 P.2d 18 (Syl. 8-9),

and *Carnley v. Cochran* (9162) 369 U.S. 506, 516, 8 L.Ed.2d 70, 82 S.Ct. 884.

This presumption against waiver is especially applicable in cases dealing with very young defendants (and Petitioner was only twenty years of age at the time, with no record of prior involvement in criminal activity, or in contacts with law enforcement). Chronologically, Petitioner was several years over the age of minority, but the spirit of such cases as Bishop v. State (Okla.Cr., 1979) 595 P.2d 795, 796, should still be respected in this case.

## Relief and Prayers

By way of relief from this conviction, the Petitioner would pray, in addition to the voiding and vacating thereof, for the expungement of his records herein, as per the unpublished order in *WLS v. John Grider, Warden, et al.*, N.D. Okla., No. 72-C-236-C; and for a refund of all court costs, fines, and other moneys heretofore collected from Petitioner as a result of the purported conviction herein.

At the very minimum, Petitioner is entitled to withdraw his plea of guilty and proceed to trial and/or an appeal (or petition for certiorari) out of time – to raise his *Boykin v. Alabama* and *Henderson v. Morgan* lines of cases. See Jones v. Cowley (10th Cir., 1994) 28 F.3d 1067, footnote 2, at 1069.

**WHEREFORE**, the defendant prays that the Court set this matter for hearing on a date certain.

Respectfully submitted,

/s/ Allen J. Autrey
ALLEN J. AUTREY, OBA 14980
P.O. Box 570993
Tulsa, Oklahoma 74119
(918) 582-0101
Attorney for Petitioner

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that on the ___ day of May, 2000, a true and correct copy of the above and foregoing instrument was hand-delivered or mailed with proper postage thereon fully prepaid to Tim Harris, District Attorney, Tulsa County Courthouse, 500 S. Denver, Tulsa, Oklahoma, 74103.

/s/ Allen J. Autrey

**VERIFICATION**

STATE OF OKLAHOMA )
) SS:
COUNTY OF ATOKA )

TIMOTHY LESTER HERMAN, of lawful age, being first duly sworn upon oath, states:

That he is the Petitioner above named and has read the foregoing instrument and understands the same; and

that the facts therein set forth are true and correct to the best of his knowledge and belief.

/s/ Timothy Lester Herman
TIMOTHY LESTER HERMAN

Subscribed and sworn to before me, a Notary Public, by TIMOTHY LESTER HERMAN, at Stringtown, Atoka County, Oklahoma, this 09 day of May, 2000.

/s/ Tammie Sanders
NOTARY PUBLIC

MY COMMISSION EXPIRES:

July 21, 2002

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Exhibit 1

[1] IN THE DISTRICT COURT FOR TULSA COUNTY
STATE OF OKLAHOMA

| | | |
|---|---|---|
| STATE OF OKLAHOMA | : | |
| Plaintiff | : | Case No |
| vs. | : | CRF-78-2776 |
| TIMOTHY LESTER HERMAN | : | |
| Defendant | : | |

Plea, judgment and sentence taken in the above-entitled matter on April 23, 1979 before the Honorable Jay D. Dalton, Judge of the District Court in and for Tulsa County, State of Oklahoma.

APPEARANCES:
WILLIAM J. MUSSEMAN, ESQUIRE
Assistant District Attorney
Counsel for Plaintiff

RONALD H. MOOK, ESQUIRE
Counsel for Defendant

REPORTED BY:
Virginia a. Boone, CSR, RPR-CP
Official Reporter

[2] PROCEEDINGS

THE COURT: This is case number CRF-78-2776 the State of Oklahoma versus Timothy Lester Herman, charged with murder in the first degree. The case comes on today for jury trial.

I'll ask both parties if they are ready for trial, the State's attorney and Defense attorney, if they're ready for jury trial.

MR. MUSSEMAN: The State is ready.

MR. MOOK: Your Honor the defendant has an announcement, if the Court will receive it.

THE COURT: Very well.

MR. MOOK: The defendant would request at this time that the State read the information into the record.

MR. MUSSEMAN: In the District Court of Tulsa County, State of Oklahoma, State of Oklahoma versus Timothy Lester Herman.

"Be it remembered that S. M. Fallis, Jr. the duly qualified and acting District Attorney for Tulsa County, who prosecutes in the name and by the authority of the State of Oklahoma, comes now in the District Court of Tulsa County, State of Oklahoma and gives the Court to understand and be informed that Timothy Lester Herman on or about the 23rd day of [3] October, 1978 in Tulsa County, State of Oklahoma and within the jurisdiction of this court, did unlawfully, feloniously and with malice aforethought and without authority of law, did effect the death of Tammy Michelle Moody by choking and strangling to death the said Tammy Michelle Moody with a piece of cloth, then and there inflicting certain mortal wounds in the body of the said Tammy Michelle Moody from which mortal wounds the said Tammy Michelle Moody did languish and die, contrary to the Statutes in such cases made and provided, and against the peace and dignity of the State." Signed S. M. Fallis, Jr., District Attorney, by J. Pat Thompson Assistant.

MR. MOOK: We would like to make an announcement at this time.

THE COURT: Very well Counsel, you may.

MR. MOOK: By the information charging the defendant in the State of Oklahoma, through Mr. Musseman, and representing the defendant through my office and co-counsel, we have entered into consultation and discussion regarding this case. As a result of those consultations, we expect a recommendation for a life sentence upon a plea of guilty in this case.

[4] Relying upon the State as common law in the State of Oklahoma, we rely upon those negotiations and

the defendant will enter his plea of guilty to the charge filed.

You'll have to make the statement also, Mr. Herman, for the record at this time, if you agree with what I just said.

THE DEFENDANT: Yeah.

THE COURT: Are you pleading guilty at this time, Mr. Herman, to the charge that has just been read in this courtroom?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Very well. You are waiving your right to a jury trial at this time; is that correct, Mr. Herman?

THE DEFENDANT: Yes.

THE COURT: Do you realize you would be afforded an opportunity to cross-examine all the State's witnesses; you would have an opportunity to present evidence; you could testify, but no one would force or compel you in any way to present evidence or testify unless you wanted to? Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Are you under the influence of [5] medication, drugs or anything at the present time?

THE DEFENDANT: No, Your Honor.

THE COURT: Do you understand the nature of the offense you are charged with here, that being murder in the first degree?

THE DEFENDANT: Yes, Your Honor?

THE COURT: Do you tell the court that you knowingly enter this plea of guilty based upon your conference with your attorney and the negotiations that have been entered into between your attorney and the State's attorney?

THE DEFENDANT: Yes.

THE COURT: Do you tell the Court that you also understand that you have a right to remain silent, if we proceeded to trial? Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Knowing that and knowing all the facts and circumstances in this case, is it still your desire at this time to enter a plea of guilty?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Are you under the influence of medication, drugs or anything else at the present time, whatsoever?

THE DEFENDANT: No, Your Honor.

[6] THE COURT: Have you ever lost your rights of mental competency at any time in the past?

THE DEFENDANT: No.

THE COURT: Do you understand you are also entitled to a trial before this Court if you waive jury trial? You are entitled to a nonjury trial; do you understand that?

THE DEFENDANT: Yes.

THE COURT: I'll ask you at this time if you are waiving your right to nonjury trial at this time?

THE DEFENDANT: Yes.

THE COURT: Do you do this voluntarily?

THE DEFENDANT: Yes.

THE COURT: What is your understanding of the word voluntary?

THE DEFENDANT: Doing it of my own free will.

THE COURT: Are you doing this of your own free will here today?

THE DEFENDANT: Yes.

THE COURT: Very well, I'll accept at this time the defendant's, Timothy Lester Herman, plea of guilty in this matter.

I'll advise the defendant that he is entitled to forty-eight hours prior to the imposition [7] of sentence, if he desires, or you can waive that right and have immediate sentencing at this time.

MR. MOOK: Your Honor, we do waive that right, and also in accordance with our agreement with the State, we waive our right to an appeal of any judgment and sentence of this court.

MR. MUSSEMAN: Your Honor, if I might, we request that the Court ask of Mr. Herman the reason he is pleading guilty is because he is guilty and for no other reason.

THE COURT: Yes, I will ask that. I asked him earlier if he pleaded guilty voluntarily. I'll also ask Mr. Herman, are you entering this plea of guilty to the charge of first degree murder because you are guilty and not for any other reason?

THE DEFENDANT: Yes, Your Honor.

MR. MOOK: I would like to inquire of the defendant, if the Court will allow.

THE COURT: Very well.

MR. MOOK: Mr. Herman, you have been represented by my office; Mr. Tom Coleman, Mr. Randy Rankin and Mr. Brad Forrest (phonic) throughout the transactions and hearings in this matter. We have had discussion with you on numerous occasions. We have sought conference and counseling of a [8] psychiatrist, and we have even gone to the extent of using a polygraph to guide us, with a man from Detroit, Michigan.

You are aware of all those things that have been done are you not?

THE DEFENDANT: Yes.

MR. MOOK: We have researched every possibility of the law we could find of every legal question filed, in my opinion, every proper legal brief and every appropriate one in your case. Are you satisfied with the statements I am making on the record as to what we have done in our representation on your behalf?

THE DEFENDANT: Yes.

MR. MOOK: Do you have any questions in your mind about our sole dedication to your defense by your lawyers?

THE DEFENDANT: No.

THE COURT: At this time the State is entitled, if they desire, to present evidence [sic] evidence; they are not desirous to present any evidence in the bill of particulars. Is it correct you are not presenting any?

MR. MUSSEMAN: That is correct, Your Honor. We have no evidence to enter according to [9] aggravation.

THE COURT: Does the State have anything in regards to the family?

MR. MUSSEMAN: Yes, Your Honor. In regard to the punishment upon this enter of a plea of guilty, the State has had numerous conferences with the members of the District Attorney's office, reviewing all the evidence, all the law that applies to this case, and we've had extensive conferences with the family of the victim. Based upon all those evaluations, all those conferences, the State is prepared to make a recommendation that the Court sentence Timothy Lester Herman to life imprisonment.

THE COURT: Very well. The Court will at this time find the defendant guilty, based upon his plea of guilty, of murder in the first degree and will sentence the defendant to life imprisonment in the state penitentiary at McAlester.

I would like to add this, Mr. Herman. This is one of the most heinous and despicable crimes I've every witnessed, to do what you've admitted to and suggests a

wicked and sick mind beyond human comprehension. That's all I have to say.

Now, you are entitled to file an appeal. I'll advise you that your attorney has advised the [10] Court that you are desirous of waiving that right of appeal. Now, is that your desire at this time?

THE DEFENDANT: Yes.

THE COURT: Do you do that voluntarily? Is that correct?

THE DEFENDANT: Yes.

THE COURT: Counsel, I know defense counsel has filed many motions throughout the course of this trial, and has done an excellent job in the representation of this defendant, as Mr. Mook always does in cases, in protecting the rights of the defendant. I know that and I feel certain that you have advised the defendant of his right to appeal. Is that correct?

MR. MOOK: I have, Your Honor, ad I've told him of our agreement to waive those rights

THE COURT: Is that your desire, Mr. Herman?

THE DEFENDANT: Yes.

THE COURT: To voluntarily waive this right of appeal; is that correct?

THE DEFENDANT: Yes.

THE COURT: Now, you are allowed to remain in the Tulsa County jail ten days prior to transportation to the Department of Corrections, or you can have immediate transportation. What is your [11] desire?

MR. MOOK: Your Honor, in that regard, as part of the negotiations, consultations and agreement, we request immediate transportation. The defendant is aware of that, and I think he concurs in it.

THE COURT: That will be the order.

The court will be in recess.

[12] STATE OF OKLAHOMA, )
) ss.
COUNTY OF TULSA, )

I, Virginia A. Boone, Official Court Reporter for the District Court of Tulsa County, State of Oklahoma, do hereby certify that on April 23, 1979 I reported in machine shorthand before the Honorable Jay D. Dalton, Judge of the District Court in and for Tulsa County, State of Oklahoma, the foregoing proceedings had in the cause of State of Oklahoma, vs. Timothy Lester Herman, No. CRF-78-2776; that my shorthand notes were later transcribed to typewritten form as the same now appears, and that the foregoing is a true and correct transcript of the proceedings.

I further certify I am neither counsel for nor related to any of the parties involved in these proceedings.

Affix my hand and seal this 11th day of July, 1984.

/s/ Virginia A. Boone
Virginia A. Boone,
CSR, RPR-CP

[13] STATE OF OKLAHOMA, )
) ss.
COUNTY OF TULSA, )

I, Jay D. Dalton, Judge of the District Court in and for Tulsa County, State of Oklahoma, do hereby certify the foregoing was presented to me in case number CRF-78-2776, the State of Oklahoma versus Timothy Lester Herman, and I now sign the same as true and correct, and request that it be attested and filed by the Court Clerk.

Witness my had at Tulsa County, State of Oklahoma this ___ day of ___ 1984.

JUDGE OF THE DISTRICT COURT

ATTEST:

Court Clerk

Exhibit 2

IN THE DISTRICT COURT FOR TULSA COUNTY,
STATE OF OKLAHOMA

| | |
|---|---|
| TIMOTHY LESTER HERMAN<br>Petitioner<br>-vs-<br>THE STATE OF OKLAHOMA AND/OR JAMES FRAZIER, WARDEN, et al.<br>Respondent(s) | CASE NO. CRF-78-2776 |

AFFIDAVIT OF PETITIONER PRO SE
TIMOTHY HERMAN

TIMOTHY LESTER HERMAN, having been duly sworn according to law deposes and says that he is the petitioner in an action filed in this Court entitled 'Application For Post-Conviction Relief' to vacate judgment and sentence and this affidavit is made in support thereof:

1. I did not tender a [sic] oral plea of guilty upon the minutes of the court in CRF-78-2776;

2. I did not plead guilty to the offense charged in Information CRF-78-2776.

3. My attorney stated to the court that the defendant would enter a plea of guilty to the charge and stated that I would have to make the statement if I agreed with

what he said, but still I have never entered a plea of guilty to the offense charged in CRF-78-2776.

4. The Trial judge at no time did he ever ask or inquire: What is your plea to the charge? Nor did at any time I make the statement or answer: "I plead guilty,

5. The record CRF-78-2776 will not support a finding the plea guilty was entered 22 OSA Section 514, 515 and 516.

6. I affiant further saith not.

/s/ Timothy Herman
AFFIANT

Subscribed and sworn to before me this 23rd day of July, 1984

Notary Public: /s/ Lynn Stallings
My Commission Expires: August 30, 1986

[SEAL]

**IN THE DISTRICT COURT**
**IN AND FOR TULSA COUNTY**
**STATE OF OKLAHOMA**

| | | |
|---|---|---|
| **TIMOTHY LESTER HERMAN,** | ) | |
| Petitioner, | ) | |
| | ) | Case No. |
| vs. | ) | CF-782776 |
| **STATE OF OKLAHOMA,** | ) | |
| | ) | |
| Respondent. | ) | |

**ORDER DENYING**
**PETITION FOR A WRIT OF HABEAS CORPUS**
**(FOURTH APPLICATION FOR**
**POST-CONVICTION RELIEF**

(Filed June 29, 2000)

This matter coming on for consideration of the Petitioner's Fourth Application for Post-Conviction Relief, the State's Response thereto and the Court being fully advised in all premises and concerns finds as a matter of facts and conclusions of law as follows:

That the matter under consideration does not present any genuine issue of material fact requiring a formal hearing with the presentation of witnesses and the taking of testimony. *Johnson v. State*, 823 P. 2d 370, (Okl.Cr. 1991). Nor does the court need to appoint counsel for the Petitioner; nor is his presence required. The matter will therefore be decided on the basis of the pleadings and the court records.

## HISTORY OF THE PETITIONER'S CASE

On April 23, 1979, Petitioner pled guilty to the charge of MURDER IN THE FIRST DEGREE in CRF-78-2776, and in accordance with the plea agreement, Petitioner received a life sentence. At petitioner's plea and sentencing, petitioner was represented by retained counsel. It appears from the record that at the time of plea, petitioner was advised by the court of the right to a jury trial, the right to cross examine witnesses and the right to testify if petitioner so desired. Further, at time of sentencing, petitioner was advised of the right to appeal the conviction. No direct appeal was filed by the petitioner.

Petitioner has previously filed three applications for post-conviction relief. All were denied. The first denial of post-conviction relief was appealed to the Court of Criminal Appeals, and the court upheld the denial of relief by order entered of record on November 5, 1984. The second application for post-conviction relief was denied by the court on November 9, 1988. The third application for post-conviction relief was denied by the court on December 18, 1991.

Petitioner has now filed this fourth Application for Post-Conviction Relief alleging:

1. "That the fact that on this presently-challenged offense, the Petitioner was not given the minimum advice by the Court required for rendering his purported plea of guilty herein voluntarily."

2. That the court failed to advise Petitioner of his appellate remedies.

4. [sic] "That the Petitioner never formally entered his plea of guilty."

## FINDINGS OF FACTS AND CONCLUSIONS OF LAW

### I

In *Jones v. State*, 1983 OK CR 127, 668 P.2d 1170, the Court held that issues raised in subsequent Applications for Post-Conviction Relief were barred by res judicata by adverse determination in prior applications for Post-Conviction Relief. See also *Grimes v. State*, 1973 OK CR 312, 512 P.2d 23, *McClesky v. Zant*, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991), and *Johnson v. State*, 1991 OK CR 124, 823 P.2d 370.

Petitioner's Application alleges that his plea was never formally entered. This issue was decided adversely to the Petitioner in his prior Post-Conviction Relief, and is res judicata. The Petitioner's Application is denied.

### II

In *Smith v. State*, 546 P.2d 1351 (Okla. Cr. 1976), the Court held that all issues known to a Petitioner must be raised in the first Application for Post-Conviction Relief or they will be deemed to have been waived. In *Webb v. State*, 835 P.2d 115 (Okl.Cr. 1992), the Court of Criminal Appeals held unless the petitioner can assert grounds which that [sic] come within the procedural bars as set forth in the Post Conviction Procedure Act, that if there is to be finality in any criminal case, the courts must enforce the procedural bars.

In *Webb v. State*, 835 P.2d 115 (Okl.Cr. 1992), the Court of Criminal Appeals held that "[t]he mere fact that counsel fails to recognize the factual or legal, basis for a claim, or fails to raise the claim despite recognizing it, is not sufficient to preclude enforcement of a procedural default. *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). *See Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977)." Therefore, the court finds these allegations of error procedurally barred even though petitioner claims his attorney was ineffective for failing to raise them on his prior Applications for Post-Conviction Relief.

Petitioner has failed to state any sufficient reason for his failure to raise that his plea was not formally entered and due process arguments on his first three Applications for Post-Conviction Relief. As stated in [sic] by the Court of Criminal Appeals in *Webb v. State*, 835 P.2d 115 (Okl.Cr. 1992), "the application of the doctrine of res judicata and procedural bars must be exercised by appeal courts to assure finality of judgments." Petitioner has failed to state a sufficient reason for his failure to so raise them; therefore, these allegations of error are procedurally barred.

Petitioner's Fourth Application for Post-Conviction Relief is denied.

Wherefore, the court finds this allegation of error to be without merit.

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that the Petitioner's *Application for Post-Conviction Relief* is hereby denied.

**SO ORDERED** This 23 day of June, 2000.

/s/ Tom Gillert
**TOM GILLERT**
District Court Judge

**CERTIFICATE OF MAILING**

I certify that on the 29 day of June, 2000, true and correct copy of the above and foregoing Order was placed in the United States Mail with sufficient postage affixed thereto, addressed to:

TIMOTHY LESTER HERMAN #100418
MACK ALFORD CORRECTIONAL CENTER
P.O. BOX 220
STRINGTOWN, OK 74569

SALLY HOWE-SMITH
TULSA COUNTY COURT CLERK
BY: /s/ Lisa A. Weleber
DEPUTY COURT CLERK

I, Sally Howe Smith, Court Clerk, for Tulsa County, Oklahoma, hereby certify that the foregoing is a true, correct and full copy of the instrument herewith set out as appears on record in the Court Clerk's Office of Tulsa County, Oklahoma, this Jul 27, 2000

By /s/ Caci Banks
Deputy